

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ASHLY DRAKE SMITH,

Defendant-Appellant.

UNPUBLISHED

April 1, 2014

No. 312721

Wayne Circuit Court

LC No. 12-004553-FC

Before: GLEICHER, P.J., and SAAD and FORT HOOD, JJ.

PER CURIAM.

Defendant was convicted, following a bench trial, of armed robbery, MCL 750.529, first-degree home invasion, MCL 750.110a(2), larceny in a building, MCL 750.360, possession of a firearm by a felon (felon-in-possession), MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced to 13 to 20 years' imprisonment for the armed robbery and first-degree home invasion convictions, 2 to 4 years' imprisonment for the larceny conviction, 3 to 5 years' imprisonment for the felon-in-possession conviction, and 2 years' imprisonment for the felony-firearm conviction. Defendant appeals by right, and we affirm.

Defendant's convictions arise from the armed robbery of the victim. The victim was in his upstairs bedroom playing a game on his telephone when he heard the downstairs door shut. The victim lived with his brother and was anticipating his brother's return home from work. He heard footsteps and saw defendant "pop" into his room with a gun. Although he did not know defendant's name, the victim recognized defendant from a local bar. Defendant pointed a gun at the victim and demanded his wallet and marijuana. The victim had a medical marijuana card and was growing marijuana in his home for personal, medical use. However, the victim admitted to illegally selling marijuana to a man named Terry and Terry's friend. Defendant ordered the victim to the ground and a second man¹ entered the room from the hallway. The men took the victim's wallet, marijuana, and some electronic devices. The entire robbery lasted approximately two minutes. After the men left, the victim used a laptop computer to log onto Facebook and ascertain defendant's name from waitresses at the bar defendant frequented. The

¹ The victim was unable to definitively identify the second perpetrator.

victim admitted that he made derogatory racial remarks about defendant and threatened to have a bullet waiting for the thief if he returned to the victim's home. Although the robbery occurred at approximately 7:30 p.m., the victim waited until his brother arrived at 9:10 p.m. to call the police. The victim testified that he was "110% sure" that defendant was the armed robber.

Defendant's theory of the case was that the victim had an issue with defendant's racially mixed heritage and the fact that defendant was dating a Caucasian female as evidenced by the victim's disparaging racial slurs against defendant. Consequently, defendant theorized that if a robbery occurred, the victim identified defendant only because of racial animosity, a claim which the victim denied. Defense counsel elicited testimony from the victim that he wrote on Facebook that he was "pretty sure" that defendant committed the crime. Additionally, defense counsel subpoenaed four witnesses to appear at defendant's trial, to raise the defense of alibi. However, defense counsel chose to limit the defense to the attack on the credibility of the victim and excused the witnesses. Defendant expressly agreed with that strategy on the record. Although the trial judge initially questioned the credibility of the victim and admonished him regarding his improper remarks, the court ultimately concluded that the victim's identification was credible, and defendant was convicted as charged.

This Court granted defendant's motion to remand for a *Ginther*² hearing. *People v Ashly Drake Smith*, unpublished order of the Court of Appeals, entered June 19, 2013 (Docket No. 312721). On remand, the court heard testimony from trial counsel Susan Reed, defendant, and three alibi witnesses. Defendant argued that trial counsel failed to investigate and present witness testimony, thereby depriving defendant of a substantial defense. The court rejected the claim, concluding that defense counsel's action constituted trial strategy, defendant agreed with the trial strategy on the record, and the alibi witnesses would not have made a difference in the outcome of the trial because of inconsistencies in their testimony.

On appeal, defendant contends that he was deprived of the effective assistance of counsel by failing to timely file a notice of alibi defense and to call witnesses in support of that defense. We disagree. "Whether a defendant received ineffective assistance of trial counsel presents a mixed question of fact and constitutional law." *People v Armstrong*, 490 Mich 281, 289; 806 NW2d 676 (2011). "This Court reviews for clear error a trial court's findings of fact and de novo its conclusions of law." *People v Douglas*, 296 Mich App 186, 199-200; 817 NW2d 640 (2012).

"To establish a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel's representation fell below an objective standard of reasonableness and that there exists a reasonable probability that, absent counsel's errors, the result of the proceeding would have been different." *Id.* at 200. "There is a presumption that defense counsel was effective, and a defendant must overcome the strong presumption that counsel's performance was sound trial strategy." *People v Johnson*, 293 Mich App 79, 90; 808 NW2d 815 (2011). "[D]ecisions regarding what evidence to present and which witnesses to call are presumed to be matters of trial strategy, and we will not second-guess strategic decisions with the benefit of hindsight."

² *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

People v Dunigan, 299 Mich App 579, 589-590; 831 NW2d 243 (2013). “Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel.” *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010). “The fact that defense counsel’s strategy may not have worked does not constitute ineffective assistance of counsel.” *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). However, counsel may be found ineffective for the strategy employed when it is not a sound or reasonable strategy. *People v Dalessandro*, 165 Mich App 569, 577-578; 419 NW2d 609 (1988). The burden of establishing the factual predicate for a claim of ineffective assistance is on the defendant. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

It is the jury’s function to weigh the competing evidence and assess the credibility of the witnesses. *People v Unger*, 278 Mich App 210, 228-229; 749 NW2d 272 (2008). The jury may believe or disbelieve any of the evidence submitted at trial, in whole or in part, and we afford deference to that determination. *Id.* Trial counsel is not ineffective for failing to object to the prosecutor’s actions or argument particularly when the objection would have been meritless. *People v Eliason*, 300 Mich App 293, 303; 833 NW2d 357 (2013); *Ericksen*, 288 Mich App at 201. When the gravamen of the defendant’s argument requests that this Court reweigh the credibility of the witnesses, we must decline to do so because it is the province of the jury. *People v Eisen*, 296 Mich App 326, 331; 820 NW2d 229 (2012).

Following an extensive review of the record, we cannot conclude that the trial court’s factual findings were clearly erroneous and agree with the conclusions of law. *Douglas*, 296 Mich App at 199-200. Although trial counsel did not file a notice of alibi and did not move for a directed verdict in accordance with MCR 6.419(C), counsel explained that, in her experience practicing before the presiding judge, he would allow an untimely notice of alibi and generally denied motions for directed verdict. Appellate counsel failed to call any witnesses to contradict this testimony, and the judge presiding over the *Ginther* hearing did not hold to the contrary. In a bench trial, the court is presumed to know the applicable law and the difference between admissible and inadmissible evidence. *People v Lanzo Constr Co*, 272 Mich App 470, 484-485; 726 NW2d 746 (2006). In this case, the trial court exercised its discretion to conduct an orderly trial, and there is no indication that an untimely notice would have precluded the alibi defense. Indeed, the trial court allowed hearsay evidence from the investigating lieutenant in order to facilitate the trial schedule and prevent the recall of this witness to impeach the victim’s testimony. Furthermore, even if trial counsel had moved for a directed verdict, the court is not required to decide the motion at that time, but may wait until the close of the proofs. See MCR 6.419(C). With regard to these claims, defendant failed to meet his factual predicate of demonstrating ineffective assistance. *Hoag*, 460 Mich at 6.

Defendant further alleges that trial counsel failed to investigate the alibi witnesses and present this substantial defense. Because the record and the trial court’s factual findings do not substantiate this claim, we again disagree. Defense counsel Reed subpoenaed the witnesses who appeared at trial. However, after speaking to the witnesses, Reed testified that she opted not to call them at trial because they could not account for defendant’s whereabouts during the time period of the robbery. In light of the failure to provide an “air tight” alibi, Reed opted, with defendant’s express consent on the record, to proceed on a theory that attacked the credibility of the victim.

The alibi testimony presented at the *Ginther* hearing supported Reed's concerns. The two female neighbors and friends of defendant, Sarah Urban and Melissa Mulroy, testified that he was in Urban's apartment, across the hall from his own apartment, sick on her couch between 6:30 and 8:30 p.m. However, Urban testified that defendant left the apartment twice for a few minutes. Melissa Mulroy testified that defendant left for a substantial period of time, twenty minutes. Defendant's roommate, Timothy Allen Mulroy, Jr., submitted an affidavit that mirrored the claims of the female friends. However, Timothy testified at trial that defendant was asleep in their apartment on a futon at the time of the robbery. Timothy acknowledged that his testimony contradicted his affidavit, but he knowingly submitted the contrary affidavit because there was a time "crunch." The trial court held that the alibi witnesses failed to make a difference in the outcome of the case because a jury would not have found the testimony believable, and defendant agreed with Reed's trial strategy. In light of the findings of fact and conclusions of law, *Douglas*, 296 Mich App at 199-200, defendant failed to overcome the presumption of trial strategy, *Johnson*, 293 Mich App at 90, that we will not second-guess, *Dunigan*, 299 Mich App at 589-590. Unsuccessful trial strategy does not constitute ineffective assistance of counsel. *Stewart (On Remand)*, 219 Mich App at 42.

Affirmed.

/s/ Henry William Saad

/s/ Karen M. Fort Hood